No. 16,282

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REXALL DRUG COMPANY, a corporation, and ARNOLD L. LEWIS, doing business as Studio Cosmetics Company,

Appellants,

vs.

SANDRA MAE NIHIL, etc.

Appellee.

REPLY BRIEF OF REXALL DRUG COMPANY.

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The Opening Brief of appellant Rexall contained seven separate main points. Appellee replies directly to only three of these, namely, (1) whether an express warranty was made by Rexall, (2) whether appellee or her mother relied on it, and (3) whether privity of contract is required between appellee and Rexall before the warranty can extend to the appellee.

The other four points, we are told, are common with the points made by appellant Lewis They are said to be answered in that part of appellee's brief which deals with the contentions of the appellant Lewis

After several readings of the brief filed on behalf of appellee, we are unable to discover what she has to say on the choice of law question, discussed in our Point I,

on the proposition discussed in Point V that there was not sufficient evidence that the solution used had any defect, or that it was without the tolerance limits of hair curling preparations generally, containing thioglycolate, nor on the question of the admission in evidence of Exhibits 8-25, discussed in our Point VI.

These matters are passed over in discrete silence. Most of the cases we mention in points II, III, and IV are ignored. Perhaps appellee hopes to divert the attention of this Honorable Court from such authorities as *Briggs v. National Industries, Inc.,* 92 Cal. App. 2d 542, 207 P. 2d 110, or *Sheptur v. Proctor & Gamble Distributing Co.* (C. C. A. 6, 1958) 261 F. 2d 221, under which her case is not tenable. We are justified in assuming that appellee is unable to answer the portions which her brief does not discuss

Appellee says that some of the contentions of appellant Rexall are touched upon and answered in that portion of her argument which attempts to answer the separate brief of appellant Lewis. To the extent that this is the case, we adopt and rely on the reply which the Closing Brief of appellant Lewis is making thereto. This leaves for consideration only the three points previously mentioned, namely, (I) Was there an express warranty? (Brief of Appellee pp. 18-20); (II) Did the Plaintiff or her mother rely on said Warranty? (Brief of Appellee p. 21); (III) Is there necessity for privity? (Brief of Appellee pp. 21-24).

I.

Was There an Express Warranty?

(Answer to Brief of Appellee pp 18-20).

Appellee correctly limits the issue to an *express warranty*. Whether or not an express warranty was made must be determined exclusively by reference to Exhibits 7, 25, and 28. All of these exhibits have been transmitted to this Honorable Court. Appellee's brief reproduces Exhibit 13 as typical of all advertising. It also reproduces Exhibits 7 and 28, the "guarantees" allegedly found in the Cara Nome carton after it was opened at home and on a handbill obtained separately at the drugstore in Kensal at the time of the alleged purchase of the Cara Nome solution.

Exhibit 13 strikingly illustrates the correctness of our contention that no warranty was made with respect to the Cara Nome preparation in any of the advertising material represented by Exhibits 8-25. When Exhibit 13 is examined, the following language appears thereon:

> "Rexall Drug products are guaranteed to give satisfaction or your money back" and "You can depend on any drug product that bears this name Rexall."

Leaving aside for the moment whether these words are words of warranty, it is immediately clear that the assertion of dependability extends to Rexall *drug* products and *drug* products which bear the Rexall name. There are two limitations in this wording. First, it must be a *drug* product; second, it must bear the *name of Rexall.*

Obviously, the Cara Nome solution does not fall within either of these two classes. It is plainly not a "drug product" On the contrary, it is a cosmetic product Webster defines "drug" as

> "Any substance used as a medicine, or in making medicines; also, formerly, any stuff used in dyeing or in chemical operations 2. An article of slow sale or in no demand; as, a drug on (or in) the market. 3. A narcotic substance or preparation."

Likewise, Cara Nome does not bear the name "Rexall" on any of Exhibits 8-25. The ad in question includes in its language both drug and cosmetic products as well as articles for more general use, such as utensils of various kinds, cleaning preparations of various kinds, and even rubber gloves. The distinction is so obvious that we feel it unnecessary to make a prolonged list of the various categories of merchandise found in the ad. Not all of them are drugs, and the majority of them do not bear the name "Rexall".

If we now turn our attention to the trade name Cara Nome, we see that none of the Cara Nome products fall into the classification of drugs. There is face powder, dusting powder, White Mink cologne, Suntan Cream Lotion and, finally, Cara Nome Natural Curl Permanent. None of these is in the nature of drugs, as we have previously stated.

Assuming, however, contrary to the fact, that Cara Nome Natural Curl Permanent is a drug rather than a cosmetic, and assuming, contrary to the fact, that it displays the Rexall name, the only language pertaining to the nature of that product specifically is as follows:

> "Silky-soft from the first day. Three types: for normal, bleached or dyed, or gray-to white hair, and one for little girls."

None of these words even approaches the classification of a warranty and cannot by any device be stretched to fit the requirements of a warranty.

Exhibits 7 and 28 are called a guarantee. The word "warranty" does not occur in this guarantee. We do not claim that this would be necessary if the language otherwise indicated an intention to make a warranty. If the words used in Exhibits 7 and 28 were a warranty, they would limit themselves strictly to the terms of the offer in the warranty, namely, the refund of the original purchase price together with a signed letter stating why the person purchasing the article found the product unsatisfactory. There is no proof that such a demand was made, nor any proof that Rexall would have refused to honor the demand if it had received such a demand. The letter which was written to Rexall following the claimed use of the Cara Nome product was not a demand to perform in accordance with the words of the guarantee.

There is one more reason why neither of the Exhibits comprised in the advertising series [Exs. 8-25] nor the two claimed guarantees [Exs. 7 and 28] constitute a warranty and that is the fact that none of the Exhibits used words which are in the nature of a warranty. On the contrary, they plainly fall within the classification of puffing. The only answer which appellee makes is a brief reference to one North Dakota case, namely, *Hazelton Boiler Co. v. Fargo Gas & Elec. Co.* (N. Dak. 1894), 61 N. W. 151. The gist of that warranty was that the boiler would evaporate a certain amount of water from the use of one pound of coal, and that in that manner at least 20 per cent in fuel would be saved. The warranty was of specific things. The example is not applicable.

When it comes to drawing a distinction between warranty and puffing, the nature of the words used is all

important. We refer to an annotation in 158 A. L. R. 1413, 1419, in which a number of examples appear, showing clearly a difference between dealers or trade talk or seller's opinions and warranties. This annotation first refers to the general discussion of the subject in 46 Am. Jur., Sales, p. 278, and then gives a number of illustrations of what should be considered trade talk and what should be considered a warranty. We quote several cases from this annotation because they clearly show the distinction between appellee's lone case on the subject and the trend of the decisions.

> "On the theory that the advertising statement complained of did not exceed commendatory, if exaggerated, statements amounting to 'dealer's' or 'trade talk' and contained no positive false statements of fact it was held in James Spear Stove & Heating Co. v. General Electric Co. (1934; DC) 12 F Supp 977 (affirmed in (1935; CCA 3d) 80 F 2d 1012), that there could be no recovery in an action for deceit by the distributor of automatic heat-control devices for home heating manufactured or furnished by the defendant, on the facts that the latter submitted a book of advertising describing the various products, containing among other things copies of advertising matter submitted to magazines and for public perusal, stating that the equipment was 'far beyond competitive devices in quality of manufacture, dependability and precision of operation,' that in it there was the 'same mechanical dependability that distinguishes all other products bearing the G.E. monogram,' and that certain of the products would function with 'a precision unequaled in this type of equipment,' etc.

"And in Madison Kipp Corp. v. Price Battery Corp. (1933) 311 Pa 22, 166 A 377, where an inquiry, leading to purchase, was prompted by an advertisement in a trade journal of the 'Madison-Kipp die-casting machine' and the advertisement was claimed to constitute an express warranty because of the statement that with such machine 'die-casting production is on a machine-toll basis, with the same economy, accuracy and high-speed production that distinguish modern machine-toll operation,' the court held that it was not an express warranty under a statute defining that term as any 'affirmation of fact' and recognizing that a 'statement purporting to be a statement of the seller's opinion only' could not be so classified, and further held that the statement was a mere expression of the vendor's opinion and did not aid to establish the plaintiff's claim, particularly where there was no showing that it was untrue. Similar views were expressed in F. M. Sibley Lumber Co. v. Schultz (1941) 297 Mich 206, 297 N. W. 243 (later appeal in (1944) 309 Mich. 193, 14 N. W. 2d 832), where language less positive as to the merits of plywood of a certain description, contained in the circular of a manufacturer, expressed by the representative of a lumber company making a sale of such material for use in erecting concrete forms was considered as embracing no express warranty, and fact findings that no implied warranty existed were approved.

"In Ralston Purina Co v. Iiams (1943) 143 Neb. 588, 10 N. W. 2d 452, where a stock food company advertised by radio and in newspaper publications that 300 pounds of hog feed which it manufactured would produce 100 pounds of pork, and a farmer

who heard the broadcast, and apparently upon the strength of the various advertising activities, went to the stock company's local dealer, who confirmed the statement, upon which purchase was made, the court took the view that a recovery upon the theory of fraud as for a breach of an express warranty could not be sustained, upon the theory that in order to establish an express warranty there must be something positive and unequivocal concerning the product sold upon which the vendee must be shown to have relied, and which is understood by the parties as an absolute assertion concerning the product, as distinguished from a mere expression of opinion, belief, judgment, or estimate, and considered that such statements amounted to dealer's talk, puffing, or praise of the seller's goods. There was a strong dissenting opinion, however, upon the theory and view of the evidence as a whole that the buyer's claim was supported by sufficient evidence that the radio advertisements sponsored by the company constituted a positive statement of fact, which was not only uncontradicted but confirmed by its agent, and that the natural effect was to cause the buyer to rely thereon, to his damage, in ordering a certain amount of such feed after estimating his needs according to the representation made. A similar construction of such language seems to have been taken in Ralston Purina Co. v. Cox (1942) 141 Neb. 432, 3 N. W. 2d 748.

The law in California which we suggested is applicable in this case is precisely to the same effect, and we quote from 43 Cal. Jur. 2d, Sales, Par. 106, as follows:

"*Statement of Opinion or Judgment.*—The seller of goods may not be held liable for erroneous state-

ments that were mere expressions of opinion and so understood by the parties. The law has long recognized that sellers of property, in their zeal to consummate sales, are prone to 'puff their wares,' and exaggerated statements of value are held to be mere expressions of opinion rather than material representations of existing facts, where the parties deal at arm's length. In this category are representations of future profits to be derived by the buyer from the property offered. The rule stated in the Uniform Sales Act is that no affirmation of the value of goods or any statement purporting to be only a statement of the seller's opinion is construed as a warranty."

II.

Did the Plaintiff or Her Mother Rely on Said Warranty?

(Answering brief of Appellee p. 21)

Our claim that there was no evidence of reliance is also brushed aside with a casual comment. Only two paragraphs are devoted to this most important consideration. Appellee does not refute the fact that the ads, Exhibits 8-25, *were never exhibited to plaintiff's mother at the trial and that she was never asked to identify them.* All she told is that she saw ads of Cara Nome products in various periodicals, that they were safe and dependable, and that she relied thereon. In a claim of express warranty it would seem indispensable that the exact language upon which Mrs. Nihil says she relied be identified. This was not done. A most important link in her proof of claimed reliance is absent.

If the warranty were to be extended regardless of the absence of privity, an exact identification of the words

relied on would be the minimum safeguard to be required to prevent spurious claims.

Of course, no amount of reliance on words used in advertising is sufficient when, in fact, the words used do not constitute a warranty.

We have discussed the effect of Exhibits 7 and 28 earlier. The exhibit which was in the carton and which was not seen until the carton was opened *could not have been an inducing factor in the purchase.* Inasmuch as the hand bill containing the "guarantee" which is claimed to have been seen before the purchase is identical in wording with the one found in the box, this point is of no consequence. The fact remains that the distinction between puffing and warranty applies with peculiar force to Exhibits 7 and 28. No "fact" as distinguished from "opinions" is stated or warranted there.

III.

Is There Necessity for Privity?

As far as California is concerned, the question stated in the heading must be answered in the affirmative. California has not yet dispensed with the necessity for privity except in the limited area of food and similar cases which was extensively discussed in *Burr v. Sherwin-Williams Co.,* 42 Cal. 2d 689, 268 P. 2d 1041.

With this recent case in California, and in view of the discussion in Point I of the opening brief of this appellant (pp. 17 and 18), the law laid down in *Burr v. Sherwin-Williams Co.,* should furnish the basis for decision in the present case. We submit that this Honorable Court is not helped with citations from Kentucky, Missouri, Washington, or Ohio. None of these are cosmetics cases. Moreover, in some of these cases the advertising

material was strikingly different from the advertising material in the case at bar, and in others the advertising material was not set out in the opinion. For instance, in *King v. Ohio Valley Termanix Co.* (Ky. 1948), 214 S. W. 2d 993, only the immediate retail seller was before the court. The question of privity is not discussed. An *implied* warranty was held to result from the following words:

> "Bruce Termanix insulation provides a complete chemical barrier throughout the under-structure and adjacent grounds. This blocks every possible approach of termites from their nests in the ground. Any termites that may remain in the wood above cannot get back to the earth for moisture and some die."

If the foregoing case is cited by the plaintiff for the purpose of showing that privity is no longer a requirement, the opinion does not touch on that problem. If the case is cited to show what may constitute an implied warranty, it *is not in point* because *only* an express warranty is involved in the case at bar.

In *Turner v. Central Airway Co.* (Mo. 1945), 186 S. W. 2d 603, the sale of a ladder by a retail store was involved. The warranty was made by the retailer to the ultimate user.

In *Turner v. Ford Motor Co.* (Wash. 1932), 35 P. 2d 1090, advertising material of the Ford Motor Company concerning shatter-proof glass was admitted against the company in spite of the lack of privity. That case, like *Rogers v. Toni Home Permanent,* 147 N. W. 2d 612, belongs to the very small group of cases which have dispensed with the privity requirement.

Rogers v. Toni Home Permanent, supra, was decided early in 1948. We have taken the trouble of checking all reported cases in 1948 and 1949 as far as referred to in the bound volumes of the National Digest System and we find that in the year and a half since *Rogers v. Toni Home Permanent,* that decision still stands practically alone.

Disregarding dangerous instrumentalities and food and bottled beverage cases, the following cases, all decided since *Rogers v. Toni Home Permanent, supra,* still adhere to the privity rule:

Young v. Aeroil Products, 248 F. 2d 185 (portable elevator);

Page v. Cameron Iron Works, 155 Fed. Supp. (airplane);

Albers Milling Co. v. Donaldson, 156 Fed. Supp. 683 (poultry feed);

Cooper v. Reynolds Tobacco Co., 158 Fed. Supp. 22 (Cigarettes);

Caplinger v. Werner, 311 S. W. 201 (boat explosion);

Zumpino v. Colgate Palmolive Co., 173 N. Y. S. 2d 117 (under-arm deodorant);

Zahn v. Ford Motor Co., 164 Fed. Supp. 936 (defective ashtray);

Ross v. Philip Morris, 164 Fed. Supp. 683 (Cigarettes);

Larson v. U. S. Rubber, 163 Fed. Supp. 327 (Rubber Boots);

Kaczonarkiewicz v. L. A. Williams Co., D. & C. 2d 14, 106 P. L. J. 1 (Stepladder).

Conclusion.

For all the foregoing reasons, as well as for the reasons set forth in Rexall's Opening Brief and in the briefs of appellant Lewis, we respectfully submit that the following answers are the correct and proper ones to give to appellee's questions:

1. That there was no express warranty.

2. That there was no competent evidence that plaintiff or her mother relied on the advertising, assuming, but not conceding, that it did constitute a warranty.

3. That the requirement of privity is still enforced in the majority of jurisdictions in spite of the views expressed in *Rogers v. Toni Home Permanent.*

For all the foregoing reasons it is respectfully urged that the judgment for the plaintiff herein be reversed with directions to enter a judgment for the defendant, Rexall Drug Company.

Respectfully submitted,

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Attorneys for Appellant Rexall Drug Company.